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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GEORGE JACOBS, Defendant and Appellant.	F057101 (Super. Ct. No. 08CM7084) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, William K. Kim and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted George Jacobs, who represented himself at trial, of (1) battery by a confined person on a non-confined person, Correctional Officer M. Oliveira, with a

weapon (Pen. Code, § 4501.5;[1] count 1), (2) battery by a confined person on a non-confined person, Correctional Sergeant D. Scaife (§ 4501.5; count 2), (3) battery by a confined person on a non-confined person, Officer Oliveira, with a liquid (§ 4501.5; count 3), (4) possession of a sharp instrument by a confined person (§ 4502, subd. (a); count 4), (5) assault on a correctional officer, Oliveira, with a deadly weapon and by force likely to produce great bodily injury (§ 4500; count 5), and (6) assault on a correctional officer, Scaife, with a deadly weapon and by force likely to produce great bodily injury (§ 4500; count 6). The jury found true deadly weapons use allegations attached to counts 1 and 2. (§ 12022, subd. (b)(1).) Following a bifurcated trial, the jury found true allegations that Jacobs had suffered four serious prior felony convictions (§§ 667, subd. (a)(1)) and four prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

The court granted Jacobs's request for appointment of counsel for the sentencing hearing. The court sentenced Jacobs to state prison for an indeterminate term of 54 years to life and a determinate term of 20 years, comprised as follows: (1) Count 5 - 27 years to life for the offense, plus 20 years for the four prior felony allegations; (2) Count 6 - a consecutive term of 27 years to life for the offense plus 20 years for the four prior felony allegations; and (3) Counts 3 and 4 - two concurrent terms of 25 years to life. On counts 1 and 2, the court imposed and stayed terms of 25 years to life, plus one year for the weapons enhancement, plus 20 years for the prior serious felony allegations.

On appeal, Jacobs contends (1) there was insufficient evidence to support his conviction in count 2 for battery of Scaife, (2) the concurrent term imposed on count 4 should have been stayed pursuant to section 654, (3) the court either failed to make an informed exercise of its sentencing discretion or abused its discretion when it sentenced

[1] All further statutory references are to the Penal Code.

him to a consecutive term on count 6, and (4) his sentence constitutes cruel and unusual punishment. We will affirm.

FACTS

One morning, Correctional Officer Matthew Oliveira was collecting the breakfast trays from inmates at Corcoran State Prison. The cell doors on the lock-down unit where Jacobs was housed have a small port that an officer must unlock to retrieve the tray. Jacobs, who was the only inmate in his cell, passed his tray through the port. After Oliveira disposed of the tray, he turned to close the port. As he did so, he was "speared in the right shoulder." The spear, which was three feet long with a one-and-one-half inch tip, appeared to be constructed of rolled-up paper and the tip appeared to be sharp metal. The spear contacted Oliveira at the upper part of his right shoulder just above the armpit. Oliveira was wearing his uniform jumpsuit and a stab resistant vest. The spear's metal tip probably would have struck Oliveira's throat had he not leaned to his left. The metal tip did not reach his skin, although it left a small hole in the shoulder area of the jumpsuit. Jacobs continued his stabbing motion with the spear. As Oliveira reached for his pepper spray, he was hit twice in his left hip area with a yellow liquid that smelled like urine. The liquid, which was in white state-issued paper cups, was thrown from inside the cell through the port.

Correctional Sergeant Dennis Scaife and Correctional Officer Todd Cogdill came to assist Oliveira in response to an alarm. Scaife ordered Jacobs to "cuff up," which required Jacobs to place his back to the cell door and put his hands where they could be cuffed through the door's port. Jacobs nodded as though he understood. As Scaife approached the door to place the cuffs on Jacobs, he saw a flash of a three foot long spear-like weapon thrust in his direction. The weapon appeared to be made of rolled up newspaper, but Scaife did not see the tip. Cogdill could not tell whether the tip was made from a different material. Scaife felt the weapon tug on the left sleeve of his uniform, in the lower left bicep area; the weapon did not puncture or damage his uniform, and did not

break his skin. Scaife actually felt the weapon strike him. Cogdill was not sure if the spear struck Scaife, but afterward Scaife said he thought he felt the spear hit his sleeve.

Correctional Officer Michael Baeza was the control booth officer that morning. When he saw Jacobs spear Oliveira, Baeza activated his personal alarm. Baeza then saw Jacobs "gas" Oliveira. When Scaife came to Oliveira's aide, Baeza saw Jacobs attempt to spear Scaife with the same implement. Baeza's view was partially obstructed, but he was able to see the spear-like object come out through the port toward Oliveira and Scaife. He could tell the object was long, but could not tell what it was made of or its exact length.

Correctional Officer Adrian Robles took photographs of the scene and searched Jacobs's cell. He also took custody of Oliveira's jumpsuit, which was admitted into evidence. Robles was trained in the methods by which inmates manufacture weapons constructed from paper. He explained that inmates roll paper from magazines or newspapers tightly, and then use water and soap to form a hard object. Inmates can then put on the end of the paper any kind of metal object, such as a staple or razor blade, or even a plastic toothbrush, and sharpen the end to a point. When an object like this is thrown into water it becomes soggy and falls apart. Robles observed a lot of water on the floor of Jacobs's cell. He also saw wet paper in the toilet and on the cell floor, which was possibly from a magazine or newspaper. The spear-like weapon was not found.

Defense

The jumpsuit Oliveira was wearing the day he was assaulted was about two years old. He washed the jumpsuit approximately twice a week. When he put it on that day, he was certain the jumpsuit did not have a puncture in it at the place where Jacobs speared him.

Correctional Officer Richard Castro searched Jacobs's cell after the assault. He did not find any contraband or a handmade weapon. The only liquid substance he found was in the toilet; he did not identify the type of liquid it was. No urine or fecal matter

was found in the cell. There was shredded, unraveled paper in the cell. Castro admitted an inmate could flood his cell by plugging his toilet with toilet paper and flushing the toilet continuously. The paper found in Jacobs's toilet was consistent with trying to flood the cell, but was also consistent with trying to destroy an inmate-manufactured weapon. Castro did not find any white cups. It would be normal for an inmate to attempt to get rid of evidence of an inmate-manufactured weapon by putting it in the toilet. Castro explained that a spear can be made out of newspaper by rolling paper up tightly and bonding it with soap, and sometimes wrapping string around it. To destroy it, someone would just have to wet it and take it apart.

Correctional Officer Geraldo Tamayo was picking up trash and food trays with Oliveira the morning of the assault. He saw a three foot long spear-like objection with a pointed end come out of the food port of Jacobs's cell. Tamayo did not see the object strike Oliveira. Soon after, he saw a liquid substance coming out of a white cup. When Scaife approached the cell, Tamayo saw Jacobs stick the spear-like object through the port again. He did not see the object come into contact with Scaife.

DISCUSSION

Sufficiency of the Evidence

Jacobs contends there is insufficient evidence to support his conviction in count 2 for battery by an inmate on a non-confined person because the evidence failed to establish that Jacobs directly applied any physical force to Scaife. Specifically, Jacobs asserts that Scaife never testified either (1) that he felt the weapon touch his sleeve or body, or (2) that the weapon contacted his sleeve which in turn touched his body. Jacobs reasons that the "tug" on Scaife's sleeve could have been caused by his own movement that occurred when he saw Jacobs swing the weapon, especially since no other officer testified they saw the weapon touch Scaife's body or clothing. We disagree.

"Our duty on a challenge to the sufficiency of the evidence is to review the whole record in the light most favorable to the judgment for substantial evidence — credible

and reasonable evidence of solid value — that could have enabled any rational trier of fact to have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Prince* (2007) 40 Cal.4th 1179, 1251.) In doing so, we presume in support of the judgment the existence of every fact a reasonable trier of fact could reasonably deduce from the evidence. (*Prince, supra,* 40 Cal.4th at p. 1251.) The same standard of review applies to circumstantial evidence and direct evidence alike. (*Ibid.*)" (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 519.)

Jacobs was charged in count 2 with battery of a non-confined person, namely Scaife, in violation of section 4501.5. As this court recently explained, "The elements of a violation of this section are: (1) The defendant was confined in a state prison; (2) while confined, the defendant willfully touched the victim in a harmful or offensive manner; and (3) the victim was not confined in a state prison. (CALCRIM No. 2723.)" (*People v. Flores* (2009) 176 Cal.App.4th 924, 930 (*Flores*).)[2] The jury here was instructed with CALCRIM No. 2723, which "explains that the touching can be done indirectly by causing an object to touch the other person, and that the slightest touching can constitute a battery. (See also *People v. Myers* (1998) 61 Cal.App.4th 328, 335; *People v. Wright* (1996) 52 Cal.App.4th 203, 210, fn. 17; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 13, p. 646.)" (*Flores, supra,* 176 Cal.App.4th at p. 930.)[3]

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[2] Section 4501.5 states: "Every person confined in a state prison of this state who commits a battery upon the person of any individual who is not himself a person confined therein shall be guilty of a felony and shall be imprisoned in the state prison for two, three, or four years, to be served consecutively."

[3] With respect to the touching required, the jury here was instructed with CALCRIM No. 2723 as follows: "The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. [¶] The touching can be done indirectly by causing an object to touch the other person."

Here, Scaife testified that the weapon made contact with him when he "felt [the weapon] tug my left sleeve of my uniform." When asked to show the jury where on his sleeve he was touched, Scaife raised his left arm and pointed to the lower left bicep area of his left arm with his right finger. When the prosecutor asked, "So you actually felt the implement strike you then?," Scaife responded, "Yes." When asked on cross-examination if in his direct testimony he "stated that an object came out of the cell and struck you in your left arm?," Scaife responded, "Sleeve of my uniform." Scaife confirmed on cross-examination that the object did not puncture his sleeve, damage the jumpsuit, break his skin, or cause any injuries.

From this evidence, a reasonable trier of fact reasonably could infer that Jacobs's weapon touched the sleeve of Scaife's uniform, and when it did so, as evidenced by Scaife's testimony that he felt a "tug" on his sleeve, the sleeve moved and touched him, thereby establishing through indirect contact the slight touching required for battery. Likewise, a reasonable trier of fact reasonably could make inferences contrary to those Jacobs argues, i.e. that the weapon did not actually touch his sleeve and the tug was caused by something other than the weapon. Before we can reverse the judgment for insufficiency of the evidence, "it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) That is not the state of the record here. Jacobs's insufficiency of the evidence argument simply asks us to reweigh the facts. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-333.) That we cannot do.

Concurrent Term on Count 4

Jacobs contends the sentence on count 4 — inmate possession of a sharp instrument in violation of section 4502, subdivision (a) — should have been stayed pursuant to section 654 because the evidence did not establish Jacobs possessed the sharp instrument at any time prior to or after the commission of the assaults and batteries. We disagree.

Section 654 precludes multiple punishment for acts that violate more than one statute but are committed as a means of accomplishing one criminal objective. Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making this determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) Its findings will not be reversed on appeal if there is any substantial evidence to support them. (*Ibid.*)

As the People point out, Jacobs's case is similar to cases where a defendant is punished both for committing an offense involving use of a weapon and being a felon in possession of a weapon. In those cases, "'[w]hether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.'" (*People v. Bradford* (1976) 17 Cal.3d 8, 22 (*Bradford*), quoting *People v. Venegas* (1970) 10 Cal.App.3d 814, 821 (*Venegas*); see also *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143-1144 (*Jones*).) "[M]ultiple punishment is improper where the evidence 'demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense....'" (*Jones, supra,* at p. 1144.) Multiple punishment is proper "where the evidence shows that the defendant possessed the firearm before the crime, with an independent intent." (*Ibid.*)

Here, a reasonable inference to draw from the trial testimony was that Jacobs possessed the spear-like weapon before he assaulted the correctional officers. Jacobs was the only occupant of his cell in a lock-down unit. Before the assaults, Jacobs had been served breakfast in his cell. It was when he passed the breakfast tray through the food

port that the assaults began. Whether he manufactured the weapon himself, which the testimony established would have taken some time since the paper had to have been wetted and then allowed to dry, or acquired the weapon from another inmate, since Jacobs was alone in his cell, he must have possessed the weapon before the assaults. There is no evidence to support Jacobs's assertion that he might have obtained the weapon at the moment he commenced the assaults. His possession prior to the crime is sufficient to support multiple punishment. (Compare *Jones, supra,* 103 Cal.App.4th at p. 1145 ["section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm"] with *Venegas, supra,* 10 Cal.App.3d at pp. 818-819, 821 [evidence presented at trial suggested that defendant obtained the gun during a struggle at the bar moments before the shooting]; *Bradford, supra,* 17 Cal.3d at p. 13 [possession was not indivisible from crime where defendant wrested away an officer's gun and shot at the officer shortly after being stopped by the officer for speeding].) Accordingly, the trial court did not err in refusing to stay enforcement of the sentence on count 4.[4]

Consecutive Sentence on Count 6

Jacobs contends that the trial court abused its discretion by failing to recognize that it was permitted to impose concurrent sentences under the three strikes law. In the alternative, he contends that even if the trial court were aware of its discretion in this regard, it abused it when it imposed concurrent sentences on counts 5 and 6. These contentions are without merit.

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[4] While the trial court did not stay the sentence on count 4, it did reject the probation report's recommendation that the count 4 sentence be a consecutive term, stating that it had "vacillated back and forth" on count 4, and taking all arguments into consideration, changed its tentative from a consecutive sentence to a concurrent one on that count.

The probation report recommended imposing terms of 27 years to life plus 20 years on counts 5 and 6, and the accompanying prior serious felony conviction allegations, with the sentence on count 6 to run consecutive to the sentence on count 5 because the two crimes involved different victims. At the outset of the sentencing hearing, the court stated it intended to follow the recommendation and invited comment. Defense counsel argued that the court should exercise its discretion to impose concurrent sentences on counts 5 and 6 because (1) based on Jacobs's prior sentences, he would exceed the normal expected life expectancy of a black male in the United States before he would even begin to serve the sentence in this case, (2) it would serve no purpose for the sentences to run consecutively, and (3) the court has discretion to take acts that arise from the same set of operative facts, objectives and incidents, and run them concurrently. The prosecutor argued defense counsel's argument that additional time should not be imposed because he would never serve the sentence in this case was "legally ludicrous," since Jacobs needed to be held accountable. Defense counsel responded that the court always retains discretion to sentence concurrently when the acts arise from the same operative facts or objective, citing to California Rules of Court, rule 4.425, and *People v. Deloza* (1998) 18 Cal.4th 585, 596 fn. 8 (*Deloza*).

The court stated it had read and considered the probation report, and heard the comments of both counsel, as well as the facts of the case during the jury trial. The court explained: "[Jacobs] is currently incarcerated on two unrelated offenses and he is serving lengthy sentences in that matter. The argument is of course he's serving an LWOP, but again [defense counsel] argues, the probation report indicates that he's serving 30-years-to-life on one case, and 32-years-to-life on the other. [¶] This is a crime that obviously involved great violence in this matter and did disclose a high degree of callousness at least in this Court's opinion as well as viciousness. [¶] [Jacobs] was armed with a manufactured weapon at the time of the commission of the offense and his conduct indicates and his convictions indicate that they are just increasing even though he is in

state prison. [¶] The court will — well, actually with respect to the strike offenses, the Court is bound by the Penal Code in this matter and intends to sentence [Jacobs] as follows:" The court then pronounced the sentence on each count, including imposing a consecutive sentence on count 6.

We review the record with all intendments in favor of the trial court's judgment, (*People v. McKee* (1995) 36 Cal.App.4th 540, 545 (*McKee*), disapproved on other grounds in *Deloza*, *supra*, 18 Cal.4th at pp. 593-594) and presuming, in the absence of evidence to the contrary, that the trial court considered all relevant criteria (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 836) and knew and applied the correct statutory and case law (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430). With this standard in mind, we conclude that the trial court did not abuse its discretion in imposing consecutive sentences.

Section 667, subdivision (c), provides that: "Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following: [¶] . . . [¶] (6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court *shall* sentence the defendant consecutively on each count pursuant to subdivision (e)." (Italics added.) A consecutive sentence is therefore not mandatory if the current felonies arise from the same occasion *or* arise from the same operative facts. (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.) Certainly, the charged offenses in counts 5 and 6, namely assault with a deadly weapon of Oliveira and Scaife, appear to meet the exception to the rule mandating consecutive sentences. We find no clear indication that the trial court believed that it was mandatory to impose consecutive sentences on all of these charges.

Jacobs points to the trials court's statement that "with respect to the strike offenses" it was "bound by the Penal Code in this matter," as showing the trial court did

not understand its discretion. The trial court's statement, however is ambiguous. Assuming the trial court even was referring to consecutive sentences, it is not clear whether the trial court believed the Penal Code required it to sentence consecutively or whether it was simply stating its intention, in light of its statements that the crimes involved great violence, the crimes disclosed a high degree of callousness and viciousness, Jacobs was armed with a manufactured weapon, and his conduct and convictions indicate they are increasing even though he is in state prison, that consecutive sentences were appropriate. Even a trial court's statement that it must impose consecutive terms does not mean that the trial court is unaware of the exception to section 667, subdivision (c)(6). (*McKee, supra*, 36 Cal.App.4th at p. 545.) As the court in *McKee* explained: "Appellant suggests that the trial court's statement that it 'must' impose consecutive terms indicates it was not aware of the exception to section 667, subdivision (c)(6). We reject this suggestion. All intendments are in favor of the trial court's judgment. [Citation.] It is reasonable to interpret the trial court's remarks to mean that, under the facts of this case, appellant's offenses did not come within an exception, i.e., the current convictions did not arise '... from the same set of operative facts.'" (*McKee, supra*, at p. 545.)

It is reasonable under the facts presented here to interpret the trial court's comment to mean that its evaluation of the individualized factors required it to exercise its discretion to impose consecutive sentences. This is particularly true since the record shows that the court was apprised of its sentencing discretion when defense counsel argued the court had the discretion to sentence concurrently on counts 5 and 6, and pointed out the authority upon which that discretion is based, and the prosecutor did not dispute the court's discretion, but instead argued defense counsel's rationale for urging concurrent sentences was illogical. The record further shows that the court was aware of its discretion, as the court stated it heard counsels' comments before rejecting defense counsel's argument, and the court actually exercised that discretion when it imposed a

concurrent sentence on count 4 despite the probation officer's recommendation of a consecutive sentence.

Jacobs contends that even if the trial court knew of its discretion, it abused it when it refused to impose a concurrent sentence on count 6. Jacobs argues the two assaults with a deadly weapon occurred during a single course of conduct which took place in a brief period of time, neither officer was injured, and there was no evidence he had separate objectives in committing the assaults. Jacobs asserts that although the trial court found the offenses involved great violence and disclosed a high degree of callousness and viciousness, assault with a deadly weapon, by its very nature, involves violence and some degree of callousness or viciousness. While the trial court also noted Jacobs was armed with a weapon when he committed the offenses, Jacobs points out this is an element of an assault with a deadly weapon and therefore cannot be used to impose a consecutive sentence. Jacobs concludes the decision to impose consecutive terms, considering all relevant factors, could not have been the result of reasoned judgment.

A trial court has broad discretion when deciding whether to impose consecutive or concurrent sentences for two or more crimes. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458 (*Shaw*).) In making its decision, the court may consider the relationship between the crimes, including whether they involved separate acts of violence or threats of violence. (Cal. Rules of Court, rule 4.425(a)(2).)[5] A trial court's discretionary sentencing choice will not be disturbed unless there is a clear showing it was arbitrary or irrational. (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 887, disapproved on other grounds in *People v. Walker* (1991) 54 Cal.3d 1013, 1022.)

Violent conduct that threatens or harms more than one victim may be punished with a consecutive sentence even if the offenses occurred during a single course of conduct. (See *People v. Calhoun* (2007) 40 Cal.4th 398, 408; *Shaw*, *supra*, 122

[5] Subsequent references to court rules are to the California Rules of Court.

Cal.App.4th at p. 459; *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, 1739; *People v. Leung* (1992) 5 Cal.App.4th 482, 502-505.) Thus, the trial court was entitled to select consecutive sentences since Jacobs committed separate acts of violence against two victims. Although the crimes were committed within a short period of time, which indicated "a single period of aberrant behavior" (rule 4.425(a)(3)), we cannot say that the trial court abused its discretion in imposing consecutive sentences.

Articulation of a single criterion is sufficient to uphold imposition of a consecutive sentence. (*People v. Bravot* (1986) 183 Cal.App.3d 93, 98.) Assuming the trial court erroneously relied on the crimes involving great violence, a high degree of callousness and viciousness, or that Jacobs was armed with a weapon, we find no reasonable probability Jacobs would have received a more favorable sentence absent the error. (*People v. Axtell* (1981) 118 Cal.App.3d 246, 259.) Accordingly, a remand for resentencing is not required.

Cruel and Unusual Punishment

Jacobs, who was 34 years old and already serving sentences of 30 and 32 years to life when sentenced, contends that his sentence of 94 years to life violates the federal and state constitutional prohibitions against cruel and unusual punishment because it is impossible for him to serve such a lengthy sentence.[6] He argues his sentence is disproportionate to his crimes, which occurred during a continuous course of conduct and did not kill or harm anyone, and when combined with his age, the fact he is serving two

[6] The People contend that Jacobs has forfeited this objection by failing to raise it before the trial court. (See, e.g., *People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Defense counsel did argue, however, that sentencing Jacobs to more than 27 years to life, for example by adding 20 years for the enhancements, would be "unconstitutional." While he did not use the words "cruel and unusual punishment," the thrust of defense counsel's argument was that sentencing Jacobs on more than one count would exceed his life expectancy, served no purpose, and was a waste. We deem counsel's argument sufficient to preserve Jacobs's claim that his sentence constitutes cruel and unusual punishment.

indeterminate terms, and the impossibility of serving out his sentence during his lifetime, his 94 years-to-life sentence "insults the dignity of man and exceeds the limits of civilized standards." He relies exclusively on Justice Mosk's concurring opinion in *People v. Deloza, supra,* 18 Cal.4th at pp. 600-601, advancing the view that sentences exceeding a human lifetime are constitutionally infirm.

Numerous courts have concluded that such sentences do not constitute cruel and unusual punishment. (See, e.g., *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382 *(Byrd*) [115 years plus 444 years to life]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137 [375 years to life plus 53 years]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 666-667 [283 years and 8 months sentence for 46 sex crimes against seven victims]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 532 [129 years for 25 sex crimes against one victim].) In *Byrd,* the court stated: "In our view, it is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution [citation] or the federal Constitution." (*Byrd, supra,* 89 Cal.App.4th at pp. 1382-1383.)

Besides the impossibility of completing his sentence, Jacobs asserts the sentence is disproportionate to his crimes. Under the California Constitution, punishment is cruel or unusual if, although not cruel or unusual in its method, it nevertheless is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) The cruel-and-unusual-punishment clause of the Eight Amendment of the federal Constitution also includes a "'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*).) A determination of whether a punishment is cruel or unusual because of disproportionality

may be made based on an examination of the nature of the offense and the offender, "with particular regard to the degree of danger both present to society." (*In re Lynch*, *supra*, 8 Cal.3d at p. 425; see also *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) With respect to the offense, we consider "the totality of the circumstances … in the case at bar …." (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) With respect to the offender, we consider his "individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*) A proportionality analysis can also take account of punishments imposed for similar or greater crimes in other cases in California and other jurisdictions. (*People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1661.)

Jacobs has not shown that his sentence constitutes cruel or unusual punishment according to these criteria. The current offenses were extremely serious and the offender is a violent recidivist who has failed to remain crime free, even while in prison, despite the application of multiple deterrents and the provision of multiple opportunities to reform. Jacobs has made no attempt to show that his punishment is disproportionate in comparison with punishments for similar or greater crimes in this or other jurisdictions. For these reasons, we find Jacobs's sentence not to be "grossly disproportionate" and therefore not cruel or unusual. (*Ewing*, *supra*, 538 U.S. at p. 23; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1431.)

DISPOSITION

The judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Ardaiz, P.J.

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Levy, J.